84-887

No. .....

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STATE OF CONNECTICUT,
Petitioner,

v.

DONALD COUTURE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Connecticut

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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36 pp

QUESTION PRESENTED

Whether certain disparaging remarks of the prosecutor in final argument deprived the respondent of a fair trial where the record discloses specific curative instructions and overwhelming evidence of the respondent's guilt in the ambush murders of three Purolator security guards?

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THE STATE OF CONNECTICUT,

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v.

DONALD COUTURE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on October 2, 1984.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 194 Conn. 530, - A.2d - (1984), and appears in the appendix hereto (Appendix A).

JURISDICTION

The decision of the Supreme Court of the State of Connecticut was entered on October 2, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

FACTS

About 6:00 a.m. on the morning of April 17, 1979, Donald Couture was arrested at his home in Wallingford, Connecticut, and charged in the April 16, 1979 murders of three Purolator guards during the robbery of approximately 1.8 million dollars in cash, checks, food stamps and jewelry from the Purolator garage in Waterbury, Connecticut. (T.11 at 38-47, 86-88, 124-30; T.12 at 79-82, 85, 116-17, 125).

During Couture's trial, which lasted more than two months, the jury heard the following evidence:

On the early morning of April 16, 1979, the day after Easter, the police were called to the Purolator Armored Car garage at Waterbury, Connecticut, where three guards, Leslie Clark, Edward Cody and William West, were found shot to death.

The exterior and interior of the garage were littered with 24 expended 30-caliber shell casings fired from two M-1 semi-automatic carbines. The truck which Cody and West had driven from Hartford that early morning into the Waterbury garage where Clark was working alone was riddled with bullet holes, and its contents, a shipment of approximately 1.8 million dollars in cash, checks, food stamps and jewelry, was missing. (T.1 at 52-57, 68-104, 164-98; T.2 at 46-51; T.3 at 53-62, 84-91; T.4 at 64-86, 99-105, 119-35; T.5 at 59-66; T.13 at 13-18).

The body of Leslie Clark was found at the rear of the van which had contained the stolen shipment. The body of William West was found in front of the van, and the body of Edward Cody was found inside the van. Leslie Clark was unarmed. William West's gun was found outside his holster near his body, and Edward Cody's

gun was found in his holster. Not one of the guards had fired a shot. Each body suffered multiple gunshot wounds, and the testimony of the pathologists indicated that many of the bullets had entered the victims' backs. (T.3 at 63-71; T.4 at 158-79, 185-88, 208-15; T.5 28-53).

Late in the afternoon of April 16, 1979, Patricia Dolphin came to the police with information that she had purchased an Iver Johnson M-1 carbine, serial number AA05518, at the request of Evelyn Vega for Lawrence Pelletier of Waterbury. Mrs. Dolphin related that Pelletier had been recently planning an armed robbery of the Purolator garage with a "Donald" whom Pelletier would talk to on the telephone. Mrs. Dolphin did not then know Donald's last name, but at the trial Mrs. Dolphin later identified Donald Couture as "Donald." (T.7 at 112-33, 139, 150-63).

Acting on this information, the police sought a search warrant for the Waterbury home of Lawrence Pelletier to search for the murder weapons, other tools, and the stolen armored car shipment. They also sought a warrant for Lawrence Pelletier's telephone toll records. The search warrants were issued very early on the morning of April 17th and they were executed shortly thereafter. (T.9 at 7-10, 23-24).

Found at Pelletier's home, where Pelletier and Evelyn Vega lived, were an attache case containing money, literature for a 30-caliber M-1 carbine, and two expended shell casings ejected from the same M-1 carbine fired at the murder scene. However, the weapon itself and the robbery loot were not at the Pelletier home. The toll record search revealed that Lawrence Pelletier often called a Donald Couture of Wallingford,

Connecticut. The police then sought a search warrant for Couture's premises in Wallingford. (T.9 at 7-23, 39-51, 74-92; T.10 at 98-107; State's Ex. 4N's, 4V's, 4W's).

The Couture search warrant was issued, and before dawn on the 17th the police entered the home of Donald Couture. There they found Donald Couture hiding under his bed. In the basement of Couture's home the police discovered the stolen armored car shipment consisting of approximately $1,800,000 in cash, checks, food stamps, jewelry, empty deposit bags, and deposit slips made out by Purolator customers. When the police found the money, one officer stated, "We found it," at which time Couture stated, "Anybody could have put it in the basement," although no one had stated where the money had been found. The police also found in the basement a gun locker containing two 30-caliber M-1

carbines. Couture was later found to have the key to the gun cabinet on his key chain. (T.11 at 37-47, 86-89, 123-26, 136-38; T.12 at 79-125; T.13 at 19-25, 43-63, 67-89, 113-43; T.24 at 110-18; State's Ex. 6D's, 6E's, 6F's).

The two M-1's taken from Couture's locker, one an Inland Marine and the other the Iver Johnson, serial number AA05518 bought for Pelletier, were examined and compared with expended cartridge cases and bullets found at the Purolator garage and with bullets recovered from the bodies and clothing of the slain guards. These latter bullets did not, as did other bullets, pass through the guards' bodies. Ten of the ejected cartridge cases at the murder scene came from the Iver Johnson carbine and fourteen had been ejected from the Inland Marine carbine. Bullets from the bodies of all three victims had been fired from the Iver Johnson carbine and

bullets from the bodies of Leslie Clark and Edward Cody had been fired from the Inland Marine weapon. Six bullet jacket fragments and one bullet fired from the Inland Marine weapon were also found at the Purolator garage, as well as two such fragments fired from the Iver Johnson carbine. These bullets and fragments were bloody. (T.4 at 183-202, 208-15; T.5 at 36-40, 49-53; T.1/6/82 at 10-11, 13, 17-44).

The Inland Marine M-1 carbine had been purchased under a fictitious name from the North Haven Gun Company by Donna Couture as a gift for her husband Donald Couture on April 12, 1979. On April 13th, the day following, Pelletier and Donald Couture were seen going into the woods near Wallingford and a great number of shots were heard in those woods. A bullet and seven expended cartridge cases recovered from the woods were found to have been

fired from the Iver Johnson and one such expended cartridge case was found to have been ejected from the Inland Marine M-1 carbine. (T.21 at 3-28, 66-71, 96-104; T.22 at 3-28, 92-97; T.25 at 5-8).

In Couture's gun locker the police also found a pair of Hit 800 bolt cutters. These cutters had been used to cut a Page metal fence surrounding the Purolator garage to allow entry into the area. These same cutters had eariler been borrowed from a Waterbury neighbor of Lawrence Pelletier by Pelletier's son. In the gun locker were also two ski masks with the eye openings narrowed by thread which Pelletier's girlfriend, Evelyn Vega, had prepared for the robbery, as well as trousers recognized as Pelletier's. The police also found there an attache case, of the same type as the one found in Pelletier's house, filled with money. A footlocker was also discovered in

Couture's basement together with store boxes for the two attache cases. All three pieces of luggage had been purchased by Pelletier and Vega on April 16th. (T.2 at 55-63; T.12 at 7, 49, 59-65, 103-06; T.19 at 127-38, 144-51; T.20 at 9-17; T.23 at 55-60; T.24 at 105-09; T.25 at 8-9, 23-24; State's Ex. 5C's, 5O's, 5Q's, 6B's, 6C's).

Donald Couture's defense consisted of cross-examination of the State's witnesses and the presentation of three defense witnesses. One defense witness was Herbert Dolphin, a brother-in-law of Patricia Dolphin, who attacked the credibility of Patricia Dolphin and stated Mrs. Dolphin once asked him for firearms. A second defense witness was Barbara Ranando of the Colonial Bank and Trust Company who identified a bank deposit bag (Defendant's Ex. C-47) found with the robbery loot as a Colonial Bank deposit

bag given in 1975 to Richard Damonte, the last Couture witness. Mr. Damonte testified he had been a partner of Donald Couture in a luncheonette business which closed in 1975. (T.25 at 130-231; T.26 at 5-10).

RULINGS BELOW

During the opening portion of final argument, the prosecutor made a number of disparaging comments concerning the defendant. For example, he referred to the defendant and his codefendant as "cowards," "cold blooded, merciless killers," and "murderous fiends." Defense counsel's contemporaneous objections to these and other remarks were overruled. (T.27 at 7, 10, 12, 25, 27, 29, 34, 35, 39, 41, 45); State v. Couture, 194 Conn. 530, 560-61 & n.17, - A.2d - (1984)(App. A at 32a-33a). At the conclusion of the

prosecutor's argument, the defense moved, in the alternative, for a mistrial or for the court to strike the summation remarks with instructions to the jury to disregard the remarks. It was defense counsel's claim that the prosecutor's remarks had violated his client's right to due process of law. The trial court denied the motion for mistrial and motion to strike. (T.27 at 50-57); State v. Couture, 194 Conn. at 561, - A.2d - (App. A at 32a-33a). However, before the jury began its deliberations, the trial court gave the following cautionary instructions:

> In every case, the jury is instructed not to allow sympathy or emotion to affect their verdict. This is especially so in these cases due to the deaths of the three victims.
>
> The very nature of the cases are such as to rouse passions. You must decide the cases soley on reason, the law as given to you and the evidence before you.
>
> Thus, sympathy for the victims, their families, or the defendants

> and their families or anyone else connected with the case must not enter your deliberations.
>
> I specifically charge you not to be inflamed by the passionate nature of State's Attorney Scanlon's argument or by his repeated personal derogatory comments on the defendant. The defendants character is not in issue.
>
> With respect to Mr. Scanlon's argument before you, I specifically charge you that you are not to consider any personal observations of his as to the guilt or innocence of the defendants, or as to the credibility of any witness.

(T.27 at 184-85); State v. Couture, 194 Conn. at 561, - A.2d - (App. A at 33a).

After several days of deliberation, the jury found Couture guilty of the murders of the three Purolator guards. (T.29 at 3-8).

On appeal to the Connecticut Supreme Court, Donald Couture claimed that the prosecutor's summation was improper and inflammatory, depriving him of his fourteenth amendment right to due process of law. (Defendant's Brief to the

Connecticut Supreme Court at 32-37). The State contended that the remarks, while harsh, were supported by the evidence. The State further argued that overwhelming evidence of the defendant's guilt coupled with the trial court's curative instructions rendered harmless any improprieties in the remarks. (Brief of the State-Appellee to the Connecticut Supreme Court at 31-45).

On October 2, 1984, in a 4-1 decision, the Connecticut Supreme Court reversed Couture's triple murder convictions and ordered a new trial. The court concluded that although the record permitted no serious doubt of guilt, the prosecutor's comments had nevertheless deprived the defendant of his due process right to a fair trial. State v. Couture, 194 Conn. 530, 560-65, 566, - A.2d - (1984)(App. A at 32a-36a, 38a). Justice Arthur H. Healey dissented. Although Justice Healey

agreed with the majority that the remarks were improper, he concluded that they did not cause substantial prejudice to the defendant so as to deprive him of his constitutional right to a fair trial. State v. Couture, 194 Conn. at 566-73, - A.2d - (App. A at 38a-43a).[1]

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[1]The respondent's argument to the Connecticut Supreme Court was that the prosecutor's remarks had deprived him of his fourteenth amendment right to due process of law. In his brief to the Connecticut Supreme Court, the respondent relied almost exclusively on federal case law and did not invoke any state constitutional protections. See Defendant's Brief to the Connecticut Supreme Court at 32-37.

In deciding the respondent's due process claim, the Connecticut Supreme Court made repeated reference to decisions of this Court and cited to 40 L.Ed.2d 886, an annotation concerned with this Court's views on the due process implications of improper prosecutorial argument. The Connecticut Supreme Court did mention the Connecticut constitution in a closing paragraph. However, "[t]he [reference] to the state constitution in no way indicate[s] that the decision below rested on grounds in any way independent from the state court's interpretation of federal law." Michigan v. Long, - U.S. - , 103 S.Ct. 3469, 3477 (1983). As evidenced by other decisions, the Connecticut Supreme Court is aware that under this Court's holding in Michigan v. Long, - U.S. - , 103 S.Ct. 3469 (1983), it must clearly and expressly indicate that its decision rests on independent

state grounds. See, e.g., State v. Cohane, 193 Conn. 474, 483, 495 n.16, 498 n.19, 479 A.2d 763, 770, 776 n.16, 777-78 n.19 (1984); State v. Binet, 192 Conn. 618, 627 n.9, 473 A.2d 1200, 1205 n.9 (1984); State v. Ferrell, 191 Conn. 37, 45 n.12, 463 A.2d 573, 578 n.12 (1983). There is no such clear and express indication in this opinion.

The petitioner also points out that in a more recent opinion, the Connecticut Supreme has cited to its Couture decision as one that involves constitutional standards rather than an exercise of supervisory authority. See State v. Fullwood, 194 Conn. 573, 584-85, - A.2d - (1984).

ARGUMENT

REASON FOR GRANTING THE WRIT

The Decision of the Connecticut Supreme Court that the Prosecutor's Summation Remarks Deprived the Respondent of a Fair Trial Is in Direct Conflict with Applicable Decisions of this Court.

The Connecticut Supreme Court concluded that although the record permitted no serious doubt of guilt, the prosecutor's summation remarks had deprived Donald Couture of his right to due process of law. For this reason, the court reversed his triple murder convictions and ordered a new trial. Under due process and harmless error standards emphatically and repeatedly enunciated by this Court, the reversal was a drastic and unneccessary remedy warranting review by this Court.

Just last year in United States v. Hasting, - U.S. - , 103 S.Ct. 1974 (1983), this Court spoke out clearly concerning

the standards for determining whether improper argument by a prosecutor constitutes reversible error. That this issue continues to be of special concern to the Court is evident from the Court's recent grants of certiorari in United States v. Young (83-469), 736 F.2d 565 (10th Cir. 1983), cert. granted, - U.S. - , 104 S.Ct. 1271 (1984), and in Caldwell v. Mississippi (83-6607), 443 So.2d 806 (1983), cert. granted, - U.S. - , 53 U.S.L.W. 3269 (Oct. 9, 1984). See also United States v. Bagley (84-48), - U.S. - , 53 U.S.L.W. 3365 (Nov. 13, 1984), granting cert. to 719 F.2d 1462 (9th Cir. 1983).

In Hasting, this Court stated that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." - U.S. - , 103 S.Ct. at 1980. See also

Donnelly v. DeChristoforo, 416 U.S. 637 (1974). In cases of alleged prosecutorial misconduct, review and analysis of the entire record is necessary because the crucial inquiry for due process purposes is the misconduct's effect on the trial, not the culpability of the prosecutor. Smith v. Phillips, 455 U.S. 209, 219, 220 n.10 (1982).

This Court has also repeatedly held that the relative strength of the evidence against a defendant is a significant factor in determining whether improper argument requires reversal of a conviction. See, e.g., United States v. Hasting, - U.S. - , 103 S.Ct. 1974, 1981-82 (1983); Chapman v. California, 386 U.S. 18, 22-23, 25-26 (1967); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239-40, rehearing denied, 310 U.S. 658 (1940). "For it is only by assessing the weight of the evidence against the

defendant that the effect of [an] error on the jury's verdict can be judged." Connecticut v. Johnson, - U.S. - , 103 S.Ct. 969, 982 (1983)(dissenting opinion).

For two months, the jury in this case sat and heard testimony detailing Couture and Pelletier's planning of the robbery, the purchasing of the M-1 semi-automatic carbines, the killing of the guards, and the finding of the 1.8 million dollar robbery loot and murder weapons in Couture's basement. The State's case against the respondent was unanswered and unanswerable. See United States v. Hasting, - U.S. - , 103 S.Ct. at 1982. The trial record permitted no doubt that absent the prosecutor's remarks, the jury would have returned verdicts of guilty on the law and the evidence.

In the Connecticut Supreme Court's own words the crimes were heinous and the record permitted no serious doubt of

guilt. State v. Couture, 194 Conn. at 563, - A.2d - (App. A at 35a). Cf. United States v. Hasting, - U.S. - , 103 S.Ct. at 1981, 1982 (this Court notes Court of Appeals own explicit statement that evidence of guilt was clear). Yet, in reversing, the Connecticut court expressly refused to attach any significance to the overwhelming evidence of respondent's guilt.

The decisions of this Court further demonstrate that the mitigating effect of curative instructions is also an important factor in assessing a claim that improper argument deprived a defendant of due process of law. See, e.g., Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974); Singer v. United States, 380 U.S. 24, 38 (1965). In this case, the trial court's instructions to the jury concerning the prosecutor's argument, although not given immediately, were forceful and clear. The

Connecticut Supreme Court again discounted the significance of those instructions in reaching its conclusion that the prosecutor's remarks deprived the respondent of a fair trial. But as Justice Healey noted in his dissent, the record provided no basis and the court offered no reasoning to demonstrate that the jury could not and did not follow these instructions. State v. Couture, 194 Conn. at 572, - A.2d - (App.A at 43a).

In Buchalter v. New York, 319 U.S. 427, 431 (1943), this Court said that "'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" See also United States v. Morrison, 449 U.S. 361 (1980). Within our constitutional framework, reversal of the

respondent's convictions should only have occurred because of demonstrable prejudice. However, the Connecticut Supreme Court reversed without any analysis of how the defendant was prejudiced to such a degree that he was denied his constitutional right to a fair trial, that is, "a trial whose result is reliable." See Strickland v. Washington, - U.S. - , 104 S.Ct. 2052, 2064 (1984). It is not surprising that the Connecticut court was unable to articulate just how the prosecutor's remarks rendered the verdict unreliable, when the court itself viewed the record as permitting no serious doubt of guilt.

While the Connecticut Supreme Court wrote that finding the prosecutor's remarks improper is not the end of the inquiry, that is precisely where the Connecticut court did end its inquiry. But, as this Court has held, "the

interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the [reviewing] court view[s] as prosecutorial overreaching." United States v. Hasting, - U.S. - , 103 S.Ct. at 1979. Society's interest in the prompt and effective administration of criminal justice must be considered by appellate courts. See Rushen v. Spain, - U.S. - , 104 S.Ct. 453, 455 (1983); United States v. Hasting, - U.S. - , 103 S.Ct. 1974, 1981 (1983); Morris v. Slappy, - U.S. - , 103 S.Ct. 1610, 1617-18 (1983). Reversal on the record in this case needlessly infringed upon that interest.

CONCLUSION

The Connecticut Supreme Court held that notwithstanding overwhelming evidence of guilt and notwithstanding the trial court's curative instructions, due process compelled reversal of Donald Couture's murder convictions. Due process, as defined by this Court, compelled no such result, and the decisions of this Court cannot be ignored. See Connecticut v. Johnson, - U.S. - , 103 S.Ct. 969, 980 (1983)(dissenting opinion). The decision of the Connecticut Supreme Court represents an egregious departure from the precedents of this Court, a departure which needlessly burdens and lessens respect for the administration of criminal justice.

As Justice Healey observed in dissent, the Connecticut Supreme Court appears to have confused the principles which have

consistently governed due process analysis with those principles governing an appellate court's exercise of supervisory power. The misapplication and intermingling of these principles in a case presenting overwhelming evidence of guilt warrants review by this Court. For this case presents the Court with an opportunity to distinguish between these principles and to make clear that when deciding whether prosecutorial misconduct has deprived a defendant of due process, appellate courts cannot ignore overwhelming evidence of guilt.

For all these reasons, the State asks that this Court grant its petition for a writ of certiorari or, in the alternative, summarily reverse the decision of the Connecticut Supreme Court.

RESPECTFULLY SUBMITTED,
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